Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

COMMENTS OF THE CITY OF NEW YORK

Introduction

The City of New York ("City") respectfully submits these comments in the above captioned proceeding. The City commends the Federal Communications Commission's (Commission's) efforts to develop a comprehensive record on the appropriate regulatory treatment of "IP-enabled services," including "VoIP."

The City's comments herein concentrate on our concern that the instant proceeding – particularly when viewed in the context of the "Wireline Broadband" NPRM[1] and the "Cable Modem" Declaratory Ruling and NPRM[2] – suggests an inclination by the Commission to "deregulate" certain IP-enabled services by reclassifying them as information services and, then, to exercise its legally questionable "ancillary jurisdiction" under Title I of the Act to enforce selected common carrier obligations. In the City's view, this would be a mistake. As customers increasingly "speak with each other using

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[1] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*; CC Docket No. 02-33, CC Dockets Nos. 95-20, 98-10; *Notice of Proposed Rulemaking*; FCC 02-42 (rel. Feb. 15, 2002) ("*Wireline Broadband NPRM*").

[2] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities and Internet Over Cable Declaratory Ruling and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Notice of Proposed Rulemaking (rel. Mar. 14, 2002) ("*Cable Modem NPRM*").

VoIP-based services instead of circuit-switched telephony and view content over streaming Internet media instead of broadcast or cable platforms,"[3] such a course would have the Commission substitute its own policy judgments for the laws and regulatory frameworks that have been established by Congress with respect to common carriers under Title II of the Act, broadcasters under Title III of the Act and cable operators under Title VI of the Act.

It would be especially rash for the Commission to rely on its ancillary jurisdiction as a legally sufficient and legitimate basis for compelling information service providers potentially to undertake a multitude of essential requirements related to emergency response, law enforcement, disability access, universal service and reciprocal compensation, in addition to certain other important requirements that are not raised in the NPRM. The objectives served by these requirements are far too critical to be predicated on an uncertain legal foundation. In addition, notwithstanding overwhelmingly strong legal arguments to the contrary, the City is apprehensive that reclassification by the Commission of IP-enabled services as information services could as a practical matter deliver yet another blow to the ability of municipalities to receive fair compensation for the resources they commit to help enable the deployment of Internet-enabled services.

That being said, the City of New York obviously has a tremendous amount to gain from the aggressive deployment of IP-enabled services and underlying infrastructure to serve our residents and businesses. It would be folly for the City to undertake any action, or advocate any position, that could stand as a true barrier against this progress. Indeed, the

[3] *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking (rel. Mar. 10, 2004) (*"IP-Enabled Services NPRM"*), ¶ 1.

City shares in much of the existing frustration with Federal laws that do not seem to take sufficient account of the modern regulatory needs of IP-enabled services industries. Nonetheless, Congress has provided a statutory framework for common carriers under Title II of the Communications Act and cable operators under Title VI of the Act, which accommodates the delivery of new or hybrid services without undue or excessive resort to the Commission's ancillary jurisdiction. The Commission must resist the temptation to act ahead of Congress by applying a short-term "fix." To do otherwise, could undercut essential common carrier obligations to the public, create uncertainty and ultimately hinder long-term rational deployment of IP-enabled services.

The Commission's "ancillary jurisdiction" under Title I of the Act appears to be neither a legally sufficient nor an appropriate basis for sustaining essential common carrier-type obligations.

The Commission's right to exercise its "ancillary jurisdiction" under Title I of the Act to broadly regulate IP-enabled service providers is uncertain at best. There is a compelling case to be made that, by classifying Internet enabled services as "information services," the Commission would in essence abandon its right to undertake expansive regulation of the nature that Congress has specifically allowed it to do with respect to, for example, Title II common carrier services.[4] While it is true that section 4(i) of Title I provides a general grant of rulemaking authority to the Commission[5], this authority has convincingly been interpreted as primarily being limited to augmenting the Commission's power in

[4] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999), finding that 47 U.S.C. § 201(b) provides the Commission with the authority to make legislative rules as to a Title II related matter.

[5] Section 4(i) states that the "Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its function." § 4(i), 48 Stat. at 1068 (codified as amended at 47 U.S.C. § 154(i) (2000)).

those other substantive titles of the Act in which the Commission has actually been given the right to make rules with the force of law.[6]

Nor would the Commission's exercise of ancillary jurisdiction to broadly regulate IP-enabled services under Title I of the Act provide the regulatory certainty that is sought by both industry and government. Indeed, one of the Commission's goals in reclassifying cable modem service from a cable service to an information service more that two years ago was "to remove regulatory uncertainty that may discourage investment and innovation in broadband services and facilities."[7] Not unexpectedly, however, that Commission ruling continues to be the subject of conflicting court decisions[8] and far

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[6] *See MPAA v. FCC*, 309 F.3d 796, 798 & 805 (DC Cir. 2002)("Contrary to the FCC's arguments suggesting otherwise, Section 1, 47 USC Sec. 151 [in Title I], does not give the FCC unlimited authority to act as it sees fit with respect to all aspects of television transmissions, without regard to the scope of the proposed regulations . . . The FCC's position seems to be that the adoption of [the] rules [under review] is permissible because Congress did not expressly foreclose the possibility. This is an entirely untenable position."). Indeed, the *MPAA* court also approvingly quotes from Chairman Powell's dissent from the FCC decision under review in *MPAA*:

> "It is important to emphasize that section 4(i) [47 USC Sec. 154(i) in Title I] is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a 'necessary and proper' clause. Section 4(i)'s authority must be 'reasonable ancillary' to other express provisions. And, by its express terms, our exercise of that authority cannot be 'inconsistent' with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision [as Sec. 4(i)], irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach."

309 F.3d at 806 (quoting *Implementation of Video Description of Video Programming*, 15 FCC Rcd 15230, 15276 (2000) (Powell, Chairman, dissenting)).

[7] *Cable Modem NPRM*, ¶ 97.

[8] "Local Counties" recently observed: "Numerous Federal courts have had before them the question of what should be the regulatory classification of "cable modem service." None of the Courts have agreed with the classification provided by the FCC in its cable modem order. (The most recent of these decisions was released on October 6, 2003 by a three judge panel of the Ninth Circuit Court of Appeals (Brand X Internet Services v. F.C.C., 345 F.3d 1120 (9th Cir. 2003). Relying upon its prior decision in AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000), the Brand X panel vacated the FCC's determination that cable modem service is an information service, and that there is no separate offering as a telecommunications service. The Ninth Circuit is not the only court to have reached a conclusion different than that of the FCC. In MediaOne Group v. Henrico County, 97 F. Supp.2d 712 (4th Cir. 2000), the Fourth Circuit affirmed a district court holding that cable modem service is a cable service." *See "Local Governments' Concerns With the Characterization of 'VoIP' Services,"* Statement of the National Association of Counties, National Association of Telecommunications Officers and Advisors and TeleCommUnity (collectively, "Local Government") before The United States Senate Committee on Commerce, Science and Transportation (Feb. 24, 2004).

more regulatory uncertainty than had existed prior to the ruling. Thus, in dissenting from the Commission's decision to reclassify cable modem service as an information service, Commissioner Copps rightly observed that such action represented "a gigantic leap down the road of removing core communications services from the statutory frameworks established by Congress, substituting our own judgment for that of Congress and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another."[9] Notwithstanding the significant legal uncertainty resulting from the Cable Modem Declaratory Ruling and NPRM, the Commission's action in that proceeding was relatively limited in scope as compared to the regulatory overhaul that appears to be contemplated in the instant NPRM.

Ultimately, the Commission must not, through over-reliance on its ancillary jurisdiction, transplant *essential* common carrier-related obligations from their current solid Title II regulatory foundation to a potentially unsustainable Title I regulatory framework. To the Commission's credit, the NPRM appears to recognize that various specified obligations that exist under the current regulatory regime – including those designed to ensure emergency 911 service[10], law enforcement access for authorized wiretapping purposes and some consumer protections – will be of continued relevance as communications migrate to IP-enable services such as VoIP.[11] However, the City is not comfortable that, if VoIP services were to be placed into the generally deregulated information services

[9] See Separate Statement of Commissioner Copps appended, *Cable Modem NPRM*.
[10] With respect to 911 service, the City supports the position of the Association of Public Safety Communications Officials ("APCO") that "VoIP must provide selective routing to the proper Public Safety Answering Points (PSAPs), call-back numbers, and automatic number information." See Submission of APCO to the FCC VoIP Forum (December 2003).
[11] *See NPRM*, ¶ 5 and sections V.B and VI.A.

category, these obligations would continue to apply with the same force of law that they currently occupy.

Along these lines, City is also greatly concerned about the fate of certain important common carrier obligations that are not specifically mentioned in the NPRM. Of particular interest to the City, in 1997, the Commission assigned the 311 abbreviated dialing code for non-emergency police and other local government services.[12] The Commission's order in that proceeding mandated that, when *"a provider of telecommunications"* receives a request to use 311 for such services, it has six months to take any necessary steps to complete 311 calls in its service area.[13] In long-term reliance on Commission's order, New York City has devoted considerable resources to developing, implementing and publicizing its 311 system, which provides centralized access to virtually all City services.[14]

Since March 2003, when the City activated its 311 service, more than eight million calls have been received, with the average weekday call volume well exceeding 25,000 calls. The City's 311 service has not only alleviated stress on 911 circuits and emergency call takers, as envisioned by the Commission[15], but it has made municipal government far

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[12] *See* In *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, *First Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5572 (1997) *(N11 First Report and Order and FNPRM)*. (Emphasis added.)

[13] *Id*., ¶ 35.

[14] The City's 311 service allows the residents, visitors and businesses to call one easy-to-remember number in order to receive information and access to city government services. Call takers answer questions, take service requests and refer callers to government agencies. All calls to 311 are answered by a live operator, 24 hours a day, seven days a week. Immediate access to language translation services in over 170 languages is available. When necessary, service requests made via 311 are electronically transferred to relevant agencies for direct service. For example each police precinct in the City has been equipped with computer terminal dedicated to the 311 application, so that the police can appropriately respond to quality of life complaints. *See* "311 Fact Sheet" at http://www.nyc.gov/html/311/html/factsheet.html.

[15] *See N11 First Report and Order and FNPRM*, ¶ 36.

more accessible and responsive to the public.[16] The 311 line was also a vital source of information for New Yorkers during the blackout of August 2003 and is increasingly being geared to provide real-time information to the public in the event of emergencies affecting the City.

Accordingly, the City's believes that, regardless of the particular regulatory scheme that may emerge from this proceeding, there is a compelling public interest in continuing to apply the same mandate to VoIP providers as those which exists for telecommunications services providers in relation to abbreviated dialing codes. This is especially important with respect to 311 services that have already been deployed by local governments and that are extensively used and increasingly relied upon by the public.

Existing local franchising authority would in no respect be mitigated by the a Commission reclassification of particular Internet-enabled services as information services.

Finally, the City is concerned that upon any reclassification of IP-enabled services as information services, the Commission might erroneously find – or that the providers of such services would unilaterally deem – that local franchise authority (including even existing agreements) do not apply. As the City extensively argued in the Cable Modem proceeding[17], this would be bad law. It is well established that the authority of local governments to require that the occupants of public right-of-way be authorized by

[16] The 311 system has also improved government operations and accountability. The City compiles and breaks down into useful categories monthly reports on service inquiries, which are used as an operational tool and posted on the City's Web site. *See* monthly 311 "Volumes and Performance Levels" and "Most Frequent Inquiries" at http://www.nyc.gov/html/ops/html/311/311.shtml

[17] *See Cable Modem NPRM*, Comments of the City of New York, pp. 3-5.

franchise derives not from federal law, but from state and local law.[18] This sovereign local authority has consistently been recognized and preserved, amid evolving communication technologies and competition, by Congress, the Commission and the courts.[19]

The City's concerns are particularly aroused by the Cable Modem Declaratory Ruling and NPRM's ambiguous language on preemption by the Commission of local franchise authority. In particular, among other possible routes to preemption, the Commission suggested that it could exercise its general "authority under Title I to preempt non-Federal regulations that negate the Commission's goals."[20] As extensively argued in the City's comments in that proceeding, Title I does not authorize the Commission to preempt local government authority to franchise the use of public rights-of-way to provide information services.[21] Nonetheless, based on the Commission's language and the uncertainty that ensued, the City's Cable providers have ceased paying franchise fees on revenues derived from the provision of cable modem service.

In this regard, it is important to bear in mind that the franchise "fee" compensates the public, through state and local government, for the use and occupancy of public property.

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[18] *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893).

[19] Thus, the Telecommunications Act of 1996 safeguards "the authority of a State or local government to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers." *See* Communications Act, § 253(c), 47 U.S.C. § 253(c) (1996). The Commission, in interpreting this provision in In re TCI Cablevision of Oakland County, Inc., 12 F.C.C.R. 21,296 (1997), in fact emphasized the traditional and important role of state and local governments in managing communications providers' use of public rights-of-way. Similarly, in City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999), the Fifth Circuit Court of Appeals found the Section 621 cable franchise requirement contained in Title VI of the 1984 Cable Act "merely" to be a codification of, and limited restriction on, "*local governments' independently-existing authority to impose franchise requirements.*" *Id.* at 348 (emphasis added, rejecting "the Commission's unsupported assertion that local franchising authority arises from § 621.").The Fifth Circuit found support for this conclusion in both "persuasive dicta" and in the legislative history of the Cable Act.

[20] *Internet Over Cable Facilities NPRM*, ¶ 98.

[21] *See Cable Modem NPRM*, Comments of the City of New York, pp. 15-19.

Rights-of-way are, ultimately, property contributed by citizens, or acquired by governments, and the permanent occupancy of such property for profit-making purposes must properly be associated with compensation to citizens and their government. If IP-enabled service providers who occupy municipal rights-of-way are relieved of their rental payment obligations, taxpayers will effectively be subsidizing the provision of a service by private companies.

Conclusion

The NPRM aptly notes that the development and deployment of Internet-enabled services "may challenge the central role that legacy technologies have played in American communications for 100 years."[22] While this is a compelling basis for arguing that the regulatory regime must likewise evolve accommodate this radical change, it also underscores to critical need to do the job right. Classification by the Commission of Internet-enabled services as information services is not the solution. Such action would jeopardize essential common carrier obligations to the public and create even greater uncertainty in for government and industry alike. The Commission would be wise to move deliberately and in step with Congress.

[22] *NPRM*, ¶ 3. (Cite omitted.)

Respectfully submitted,

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